NO. 942030

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE G, et al.,

Respondents,

v.

DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON

Appellant,

v.

DONNA ZINK, a married woman,

Appellant.

BRIEF OF AMICUS CURIAE, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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I.

INTEREST OF *AMICUS CURIAE*

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1,100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL was formed "to improve the quality and administration of justice." The issue for which WACDL submits this amicus brief directly bears on this purpose. WACDL has filed numerous amicus briefs in this Court. Undersigned counsel have authority to appear on behalf of WACDL as *amicus* in this case.

Amicus has advocated for exempting SSOSA evaluations from the PRA on the grounds that they constitute protected health care information since this issue was first considered five years ago in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012). WACDL appeared in a joint brief with the Washington Defender Association (WDA) as *amici curiae* on behalf of respondents to oppose the use of the PRA to obtain SSOSA evaluations. Amicus concluded: "There can be no question that a psychosexual evaluation consists of protected health care information as defined in RCW 70.02.005(7)." *Koenig* Amicus Brief, 10. While this Court declined to consider this issue at that time, *see generally Koenig*, at

id.,[1] this issue remains critically important to WACDL and has been for many years. The resolution of this issue will impact criminal defendants everywhere.

II.

ISSUE ADDRESSED BY *AMICUS*

Whether evaluations prepared for assessing treatment amenability for the Special Sex Offender Sentencing Alternative (SSOSA), an alternative sentencing disposition historically rooted in treatment of sex offenders, constitute protected health care information for purposes of the Public Records Act.

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[1] The Court of Appeals rightly determined that *Koenig* does not control the analysis of the present issue:

> As a preliminary matter, and contrary to Zink's arguments, the Supreme Court's decision in *Koenig v. Thurston County*, does not dispose of Doe's exemption arguments. The Supreme Court considered only whether the PRA exemption for investigative records applies to SSOSA evaluations and victim impact statements. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."

John Doe G. v. Dep't of Corr., 197 Wn. App. 609, 619, 391 P.3d 496 (2017) (internal citations omitted). Amicus concurs in this analysis, and indeed the DOC does not argue against the Court of Appeals' conclusion on this point. *See* Pet. for Review at 8.

III.

BACKGROUND

Washington has a long history of managing sex offending through treatment alternatives. The Washington State Legislature created SSOSA as part of the legislation adopting the Sentencing Reform Act of 1984. Sex Offender Policy Board, *Review of the Special Sex Offender Sentencing Alternative,* December 2013, Office of Financial Management: Olympia, Washington, at 10-11. The SSOSA program began in response to the sexual psychopathy laws, which had been used to detain sex offenders at facilities maintained by the Department of Social and Health Services for treatment purposes since 1949. *Id*. at 7-8. By the 1980s, treatment providers found the sexual psychopathy model outdated, and sought a community-based treatment alternative for sex offenders. Victim advocates, on the other hand, recognized that a determinate sentencing scheme would not best serve the needs of familial victims, many of whom would be unlikely to report abuse if it meant a family member may serve a lengthy prison term. *Id*. at 11. When the SRA was adopted, treatment providers and victims' advocates allied with each other to persuade the Legislature to create SSOSA. As stated by the SOPB, "The original purpose of SSOSA was to support and encourage family member victims to engage in the criminal justice system, knowing there was opportunity

for the offender to receive treatment rather than exclusively a prison term." *Id*. at 11.

In 2004, the Legislature directed the Washington State Institute for Public Policy to study sex offense trends. *See* E. Drake and R. Barnoski, 2006, *Sex offenders in Washington State: Key findings and trends*, Olympia: Washington State Institute for Public Policy, Document No. 06-03-1201; former RCW 9.94A.728 (eff. July 1, 2005). In those series of studies, WSIPP also evaluated the effectiveness of the SSOSA program. These studies, discussed below, consistently demonstrate that participation in community-based sex offender treatment reduces recidivism.

In a study that examined recidivism rates for SSOSAs, the authors determined that out of 1097 offenders who received SSOSAs, only 4.7% went on to commit a new felony offense within a five-year follow-up period, and out of that fraction of offenses, only 1.4% of those felony offenses were sex offenses. *See* R. Barnoski, 2005, *Sex Offender Sentencing in Washington State: Recidivism Rates*, Olympia: Washington State Institute for Public Policy, Document No. 05-08-1203. Further, when treated and untreated sex offender recidivism rates were examined together in a different report that was part of this series, those rates

remained at 13.7%.[2] *See* E. Drake and R. Barnoski, 2006, *Sex offenders in Washington State: Key findings and trends*, Olympia: Washington State Institute for Public Policy, Document No. 06-03-1201.

The Legislature has continued to fund research in this area. Most recently, in May 2017, a separate WSIPP study concluded that "treatment of sex offenders in the community" resulted in savings of $1607 per participant, and placed the chance that the benefits will exceed the cost at 60%. Bitney, K., Drake, E., Grice, J., Hirsch, M. & Lee, S. (2017), *The effectiveness of reentry programs for incarcerated persons: Findings for the Washington Statewide Reentry Council*, Olympia: Washington State Institute for Public Policy, Document Number 17-05- 1901.

Petitioner Zink, a private individual has filed a public records request for unredacted SSOSA evaluations containing private health care and treatment information held by the Washington State Department of Corrections (DOC). The dissent written five years ago by Justice Johnson was prescient when he concluded that redacting SSOSA evaluations was essential to protect privacy rights because a "SSOSA evaluation contains private 'health care information' in which the public has no legitimate

[2] The authors define recidivism as "as any offense committed after release to the community resulting in a Washington State conviction." *Id*. at 11.

interest." *Koenig*, 175 Wn.2d at 866 (J.M. Johnson, J., dissenting) (citing RCW 70.02.010).

It is clear from SSOSA's history that it exists solely to further the treatment of amenable sex offenders. Evaluations assist a sentencing court in deciding whether a specific offender is amenable to that treatment. As such, the evaluations constitute medical records subject to protection from disclosure under the PRA. Additionally, the analyses for PRA exemptions and sealing documents in the court file are different, as demonstrated in *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), and *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2011), cited in Petitioner's brief. This court should decline Petitioner's invitation to conflate these analyses.

For the reasons that follow, this Court should affirm the Court of Appeals decision.

IV.

ARGUMENT

A. The Legislature made the treatment-based purpose, and therefore, medical purpose, of SSOSA clear in its inception in the 1984 Sentencing Reform Act.

Because the Special Sex Offender Sentencing Alternative (SSOSA) exists to provide mental and psychological treatment for sex offenders, evaluations conducted under the SSOSA statute, RCW

9.94A.670, are done for a medical purpose. Therefore, this Court should conclude SSOSA evaluations are considered protected health care information and thus exempt from disclosure under the Public Records Act (PRA). *See* RCW 42.56.360(2).

This Court must decide whether Special Sex Offender Sentencing Alternative (SSOSA) evaluations are considered protected health care information and thus exempt from disclosure under the Public Records Act (PRA). *See* RCW 42.56.360(2). The Legislature created SSOSA for qualifying individuals accused of sex offenses. RCW 9.94A.670. Individuals seeking this disposition must undergo a psychosexual evaluation, which provides a diagnosis, treatment plan, and risk prediction. *See* WAC 246-930-320(2)(f)(ii), (iii); RCW 9.94A.670(3).

SSOSA's legislative history shows that the Legislature created this sentencing alternative with a treatment purpose in mind. When the Legislature sought to create a determinate sentencing scheme in the early 1980s, it directed the Sentencing Guidelines Commission to review sex offenses closely and make sentencing recommendations. L. Berliner, 2007, *Sex Offender Sentencing Options: Views of Child Victims and Their Parents* at 2, Olympia: Washington State Institute for Public Policy, Document No. 07-08-120l. The Commission found that "many citizens wanted to retain a treatment-oriented sentencing option for some first-time

sex offenders. Many individuals express the view that some sex offenders should be able to first attend treatment and, if the treatment failed or they did not cooperate, then have the sentence revoked and a jail or prison term impose." *Id*. at 2.

In addition, by providing a treatment-sentencing option, familial victims would be more willing to come forward and report abuse. In the above study, the author noted that "Most sexual assault victims do not report the crimes because of the fear of consequences. In addition to concerns about whether they will be believed and supported, some victims have concerns about the consequences to offenders if the crimes are reported and prosecuted." *Id*. at 2.

In 2013, the Sex Offender Policy Board (SOPB) completed a review of SSOSA at the Legislature's direction. *See* Sex Offender Policy Board, *Review of the Special Sex Offender Sentencing Alternative*, December 2013, Office of Financial Management: Olympia, Washington. The SOPB, housed within the Sentencing Guidelines Commission, was created to "advise the governor and the legislature as necessary to issues relating to sex offender management." RCW 9.94A.8673.

According to the SOPB, "[t]he original purpose of SSOSA was to support and encourage family member victims to engage in the criminal justice system, knowing there was opportunity for the offender to receive

treatment rather than exclusively a prison term." *Id*. at 11. The desire for a sex offender treatment option grew out of the shift in the early 1980s to a determine sentencing model. *Id*. at 3. With determinate sentencing in place, sexual assault advocates sought a treatment-based alternative for offenders who had a relationship to the child victim. *Id*. The desires of crime victims for treatment options, "coupled with the promising community-based treatment modalities, led to the creation of SSOSA in 1984." *Id*. at 3.

The SOPB explained in more detail why a treatment option was necessary to promote the prosecution of these offenses:

> As the work commenced in the area of sex offenses, the sexual assault victim advocate community was vocal with concern about implications for victims. They recognized that the majority of sex offenses are committed against children and that most often the offender and victim have a relationship, typically a familial one. There was concern from advocates that such a rigid sex offense sentencing structure would have a chilling effect on family member willingness to report and participate in the criminal justice process. At the same time, sex offender treatment providers were concerned that automatic prison sentences for sex offenders would render the promising community based treatment option irrelevant and undermine community safety.

Id. at 11.

In addition to carrying out the wishes of the crime victims, community treatment providers advocated for SSOSA. *Id.* Treatment providers believed that community-based treatment for sex offenders, then

a new treatment model, held promise and sought to create a treatment option for sex offenders. *Id*. Thus, "advocates and treatment providers formed an alliance to influence the legislation," and in response, the Legislature created SSOSA. *Id*.

SSOSA came into existence precisely because citizens, crime victims and their advocates, and treatment providers advocated for a treatment alternative to sex offender sentencing. While there are review hearings and the possibility of incarceration, SSOSA is first and foremost a treatment option for sex offenders. SSOSA would not exist but for crime victims' desires to see their abusers receive treatment in lieu of a prison sentence.

B. This Court has previously—and correctly—declined to read *Ishikawa* and GR 15 into resolving a Public Records Act issue.

Petitioner DOC argues that if the PRA's protection for health care information applies to SSOSA evaluations, "courts would have to decide whether to seal every evaluation or close the courtroom any time that a SSOSA evaluation is discussed." Pet. Suppl. Brief at 17. This argument is incorrect. This Court has made it plain that analysis under the PRA is separate from—and does not affect—the analysis of whether to seal court documents.

In *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), this Court considered both the *Yakima Herald-Republic*'s motion to unseal the billing documents of a capital defendant's attorneys and the paper's PRA request for those very same documents. Initially, the paper sought to unseal defense attorney billing and expert funding requests that defense attorneys had filed under seal with the trial court pursuant to CrR 3.1(f). *Id*. at 783. While litigation around that issue was pending, the newspaper adopted a new strategy to obtain the records: it filed a PRA request with Yakima County, Yakima County Superior Court, and the Yakima County public records officer. *Id*. at 785.

This Court was not concerned with the fact that there were two avenues available to the *Yakima Herald-Republic.* Instead, this Court fully analyzed the availability of these records under GR 15, *Ishikawa*, and the PRA—and conducted those analyses separately. The Court determined that while *Ishikawa* did not apply to the documents, GR 15, the court rule applicable to sealing, did apply. *Id*. at 803. Separately, under the PRA, this Court held that the records were considered court records for the purposes of the PRA and those records that were held by the court (though not those held *outside* the court by Yakima County) were exempt from disclosure. *Id*. at 809-10. The outcome of the GR 15 and *Ishikawa* analysis did not affect the outcome of the PRA analysis, and

vice versa. The DOC is therefore wrong to suggest that the outcome in this case, under the PRA, will somehow control the analysis of whether to seal SSOSA evaluations submitted to a court.

Additionally, in *Koenig*, this Court considered whether to release a SSOSA evaluation held by the Thurston County Prosecuting Attorney's Office when the court had already sealed the evaluation in the court file. 175 Wn.2d at 841. In that case, this Court considered whether SSOSA evaluations were exempt under the specific intelligence information exemption contained in RCW 42.56.240. *Id*. This Court noted that the parties in *Koenig* "stipulated that the trial court's order to seal the documents was not binding on Koenig and did not restrict the prosecutor's disclosure of the documents under the PRA." *Id*. at 841-42. In other words, the trial court's decision to seal a document in the court file had no bearing on whether the same documents were subject to disclosure under the PRA. This Court determined that "the question we must decide is whether a SSOSA evaluation is 'specific intelligence information' or a 'specific investigative record,'" *id.* at 847, correctly declining to consider the trial court's decision to seal a document when resolving the PRA issue.

This Court has consistently separated the analysis of whether to grant access to a document held by an agency from whether to grant access to a document held by a court. This case is no different. This

Court's analysis should be limited to resolving the PRA issue. Issues related to courtroom sealing are not only not properly presented, but also are analytically separate from the PRA issue that *is* before this Court.

V.

CONCLUSION

The legislative underpinnings of the SSOSA statute, and the Legislature's continued interest in evaluating SSOSA, make it plain that SSOSA was created for treatment purposes. As such, evaluations done to determine eligibility for this community-based treatment program, supervised by the court, are done for a medical purpose, not a forensic one. Additionally, this Court should limit its analysis of this issue to the PRA, not to GR 15 and *Ishikawa*.

This court should affirm the decision of the Court of Appeals.

DATED this 11th day of August, 2017.

s/Amy I. Muth
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CERTIFICATE OF SERVICE

I CERTIFY under penalty of perjury of the laws of the State of Washington that on this 11th day of August, 2017, I served true and correct copies of the attached BRIEF OF AMICUS CURIAE, THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and this Certificate of Service, on the persons hereinafter named via the method so described:

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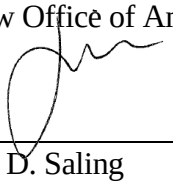

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